

**A STUDY ON EVOLUTION OF LAWS ON COMPARATIVE ADVERTISING IN  
BRAZIL**

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**ABSTRACT**

*In a cut throat environment, the product or service is represented to depict what 'others are not' and how 'it is better than the other'. These practices called comparative advertising raise questions about truthfulness and fairness of representation of products and services. Thus it makes a sense to study the evolution of law on comparative advertising. Recent judicial decisions in the matters in our country and in United States and European countries reveal that the law in these countries are quite liberal and motivates comparative advertising to ensure free market. But certain countries like Germany, China and Brazil are not so liberal in this aspect. The present article review this area of law in an stringent country like Brazil, and this work seeks to outline the current position there. The analysis provide an insight to the effectiveness of existing law on comparative advertising in Brazil in providing the consumers adequate remedies and protection against misleading and deceptive trade practices adopted by the business firms and that how these firms also have adequate defense from law against unfair trade practices, and a justice delivery system to set the 'rules of the game' for competing among themselves. Further how the law deals with the cases when the advertisers infringes the reputed trademarks and use this sought of advertising for competitor's product disparagement.*

*Keywords: Comparative Advertising, CONAR, Product Disparagement, Infringement of trademarks*

## INTRODUCTION

Liberalization and globalization adopted in the 1990s brought certain substantive changes in the structure of market and lot of reforms and changes in diverse fields were undertaken worldwide. The advent of a wider range of products and services led to increased competition, with advertising acquired a vital role in the determination of consumer demand and influenced the dynamics of the market as a whole. All modes of public media, (print, radio, television or the internet even sports, movies or cultural and political events) became increasingly dependent on advertising revenues. These changes have been discernible in these years and we need to comprehend the law related to comparative representations of products and services. This has become essential because the thrust of competition in this era of free market economy has shifted to aggressive and vigorous promotion of products and services. Comparative advertising came into existence to increase consumer awareness and allow consumer to make a judicial selection from plethora of choices, however under market pressures it has engaged in

unhealthy practices of product disparagement and infringement of trademarks. Consequently, in the last few decades, there have been spates of litigations in this regard. As there have been a proliferation in the number of cases in the courts regarding this matter and there have been interestingly such conflicting judgments concerning the issue in the recent past that the topic seemed quite fascinating and motivating to ponder and analyze at.

In the recent years the authors have been studying the issue of comparative advertising and have tried to understand the origin, types and extent of comparative advertising and its treatment in Indian jurisdictions as well as in other parts of the world like in US, European Union, France, UK, South Africa, Australia and China which have been discussed in our other publications [1-5]. Thus by analyzing the legal regime regarding CA in different countries, we have tried to examine whether and how much comparative advertising serves or discords with their interests of the consumers and that whether comparative advertising is effective in contributing to the highly concentrated market structure by

enhancing competition in the market. A careful survey of literature reveals that a good deal of comparative studies exists on laws in this regard in US, UK and European Union with India.[6-7] But there are very few reports on the statutory framework that exists in other countries of the world. [8]So in the present paper the focus is to examine that how and to what extent are these existing laws on competitive advertising effective in Brazil.

Study reveals that the legal opinion and judicial precedents have yet not attained a consensus on the extent of use of comparative advertising in Brazil. Although there is an absence of a specific litigation to check unfair comparative advertising, the statutory framework in Brazil is quite stringent to trademark infringement and product disparagement occurring in comparative advertising. There are no specific laws for trademark infringement in comparative advertising in Brazil yet the Industrial Property Law gives complete right to the trademark holder to prevent its unauthorized use in comparative advertising. Nonetheless, the level of subjectivity in dealing with the confinement of lawful comparative advertising is very high in

Brazil, fresh judicial pronouncements (discussed in detail subsequently) provide the Brazilian market players to advertise with a bit more legal certainty when promoting new business and marketing campaigns.

### **STATUTORY FRAMEWORK ON ADVERTISING IN BRAZIL**

In the early seventies when Brazil was under dictatorship advertising was harshly censored and in those circumstances the first regulations on advertising originated with the laws like Law No.4.680 (June 1965) and Decree No.57.690 (February 1966). In those days prior government approval were required before the dissemination of the advertisement in the public through any media (print or audio-visual). Under such public control the “Brazilian Advertising Self-Regulation Code” was enacted in 1978 according to which advertising self-regulation was to

- (i) establish ethical rules for the advertising industry;
- (ii) set up a scheme of dispute resolution procedures; and
- (iii) assure fast, prompt and objective solution for the disputes.

To completely enforce these rules a non government organization "The Brazilian Advertising Standards Authority (CONAR)," was established. The work of CONAR was to establish and enforce the rules related to advertising in Brazil and safeguard the freedom of expression and to defend the constitutional prerogatives regarding commercial publicity in already exposed advertisements passed from censor. This civil association embraces the modern trends adopted worldwide regarding comparative advertising and have stipulated certain norms to be fulfilled by these ad campaigns to be lawful. The norms as mentioned in "SECTION 7 Articles 32 are expressed below:-

- its main purpose must be to provide information, or even to defend the consumer;
- the basic principle must be the objectiveness of the comparison. Subjective claims, grounded on psychological or emotional factors, do not constitute a valid basis to support the comparative advertising before the consumer;
- the comparative claim must be capable to be proved;

- if the advertising is related to mass consumption goods, the comparison must be promoted between samples or models of the same year, being irregular the confrontation of products of different times, unless it constitutes a reference to show evolution, circumstance that must be clearly characterized;
- confusion between products or trademarks must not occur;
- unfair competition and tarnishment of trademarks or products owned by the competitor are strictly forbidden;
- the unjustified corporate image or reputation of third parties must not be used;

Besides this Self-Regulatory Code, in subsequent years the regulation of advertising was also done on a Federal basis, through the Consumer Protection Law (Law No. 8,078/90), the Industrial Property Law (Law No. 9.279, of May, 1996), and the Copyright Law (Law No. 9.610 of February, 1998).

## COMPARATIVE ADVERTISING IN THE GAMUT OF TRADEMARK INFRINGEMENT

In this country too, there are no specific regulations to check the fair use of trademarks in comparative advertising. Here too the Industrial Property Law ascertains exclusive rights to the trademark proprietor granting him the right to prevent others from using his registered trademark in an unauthorized manner. These rights are clearly inferred from this law whose Article 129 reads as follows:

“Article 129: *The property of a Trademark is acquired by means of registration, when validly granted pursuant to the provisions of this Law, and its exclusive use throughout the national territory is assured to the titleholder.*”

In coherence to this exclusive right, the Article 130 of this law further ascertains the following to the titleholder of a trademark

“Article 130: *The titleholder of a mark is further assured the right to:*

- a. *assigns his registration or application for registration;*
- b. *license its use;*

c. *safeguard its material integrity or reputation.*”

Thus drawing an inference one can logically conclude that the Industrial property law grants the trademark holder, the right to use it exclusively, the right to license it and the right to safeguard its reputation. It has been proposed several times that the Industrial Property Law should be modified to refer exclusively to the illicit practice and warrant greater certainty about the lawfulness of comparative advertising in Brazil. Nevertheless, the legislature does not seem to have such amendment as priority.

However, this is not the be all and end all. Article 132 of the Industrial Property Law imposes certain restrictions on the right of exclusivity of the trademark owner. According to it a trademark holder may not :-

- restrain the merchants or distributors from using their trade name/ marks along with his trade name /marks for business endorsement and marketing.
- thwart the firms, manufacturing accessories

related to his product/service, to use his trademark to represent the purpose of their product, provided that for use of these trademarks by the firms fair competition practices are adopted.

- impede those speeches, scientific or literary or general purpose publication in which reference to his trade name/mark has been done, provided the reference has not been done for any commercial connotation as well as it is not detrimental to the unique character of the trademark.

Thus, Article 132 lists all those circumstances in which it would not be possible for a trademark holder to exercise his right of exclusivity against the third parties. And it also makes it quite lucid that the circumstances in which the third party is allowed to use the restricted trademark, in no case permits it to be used for commercial purpose including comparative advertising else it would be considered to be infringement. Thus, the Article itself is

sufficient to be used by the trademark holder to stop the third parties to use his trademark unlawfully. A meticulous inspection suggests that Article 132 does not imply that Comparative Advertising is not been promoted in Brazil.

When the comparison is made between products of different prices, such circumstance must be clearly indicated in the advertising. The above mentioned norms supports comparative advertising provided the comparison made is real, capable to be proved all times and facts are stated objectively.

#### **ENFORCEMENTS IN COURTS OF BRAZIL**

Even the verdicts of the courts in the last five years have supported fair comparative advertising. The Key Brazilian Courts for Intellectual Property Rights, the Sao Paulo Court of appeals have rendered several well-grounded decisions relating to the practice of Comparative advertising, specifying certain limits so that it does not amounts to product disparagement and infringement of trademarks. Three lawsuits in Sao Paulo Courts in last five years are

worth mentioning. All three verdicts recognized the legality of comparative advertising, but confined it to the limits of rational competition.

*Case 1: Activia v Nesvita (Appeal 9103501- 36.2008.8.26.0000)*

In the case of *Activia v Nesvita* (Appeal 9103501- 36.2008.8.26.0000), in the advertisement, the first yoghurt consumer chooses Danone's Activia product, on which the second consumer persuades her to purchase Nestlé's Nesvita product instead, explaining her nutritional benefits of Nesvita compared to Activia. Activia's trademarks and trade dress were used in the ad. However, the verdict of the Sao Paulo Court of Appeals was that, there was no infringement of trademarks and the information given in the advertisement was true and verifiable and was for the aid of the consumer to make a rational purchase decision. Further, according to the verdict of the court no offence had been caused to the integrity or reputation of the competitor's trademark.

*Case 2: Unilever, vs Cirio Brasil Alimentos Ltda, (Appeal 0063180-93.2000.8.26.0000)*

The case of *POMAROLA*, the trade name of tomato sauce of *Unilever, vs Cirio Brasil Alimentos Ltda*, owner of the tomato sauce trade name *CIRIO*, (Appeal 0063180-93.2000.8.26.0000), displayed an ad in which an actress as consumer, tasted tomato sauces from two different concealed packets and opines about the tastiest one. Another actress as a reporter uncovers the packets showing the packaging of both sauces and the chosen tastier sauce to be of *CIRIO* rather than *POMAROLA*. The Sao Paulo Court of Appeals found that the comparison in the advertisement was skewed as it was build on purely subjective elements and not on a survey establishing consumers' preference. The infringement was established on the basis that the comparison did not meet the necessary objectivity to be called fair and therefore the advertisement was ceased and monetary compensation was penalized.

*Case 3: Wal-Mart Brasil Ltda and Companhia Brasileira De Distribuição*

*(CBD) (Interlocutory Appeal 0092474-10.2011.8.26.0000)*

The third case, which was between *Wal-Mart Brasil Ltda* and *Companhia Brasileira De Distribuição (CBD)* (Interlocutory Appeal 0092474-10.2011.8.26.0000), the court pointed out that Wal-Mart had shown an ad on Brazilian television to invite consumers was merely to validate that its prices were lesser than its rivals' prices. This fact did not impinge on a consumer's right to truthful information; nor did it violate the requirements of Article 32 of the code.

## CONCLUSION

Thus, we can conclude that although there are no specific laws to control unfair comparative advertising, the statutory framework in Brazil is quite stringent to trademark infringement and product disparagement occurring in comparative advertising. Further Comparative advertising

is acceptable in Brazil provided it conforms to the following limits: ☐

- (i) its primary purpose shall be the clarification or protection of the consumer;
- (ii) its basic principle shall be the objectiveness of the comparison; ☐
- (iii) the purported or implemented comparison shall be capable of being supported by evidence; ☐ there shall be no confusion between the product and/or service advertised and the competitor's brands; ☐
- (iv) there shall be no unfair competition, denigration of a product and/or service or a competitor's image; and ☐
- (v) whenever the comparison is made between products of different prices, this shall be clearly informed in the advertisement.

Nonetheless, the judicial pronouncements suggests that the law is becoming more favourable for Brazilian market players.



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